DISEASE AS A DEFENCE IN AN ACTION FOR BREACH OF PROMISE OF MARRIAGE.—The interesting question of the effect of disease, arising between the engagement and the date set for marriage, and rendering one of the parties unfit for the marital state, was recently presented to the Supreme Court of Iowa. *In re Oldfield's Estate* (Iowa 1916), 156 N. W. 977. The facts were that the deceased, whose executor the plaintiff sued, contracted pernicious anemia during the engagement period; this disease was of such a nature that marriage would aggravate it and hasten death. The court (two of the judges dissenting) held that the deceased was relieved of any obligation to marry the plaintiff, and his estate was not liable in damages for the breach of the contract. There are roughly speaking two classes in which the question involved in the principal case may arise: (1) where the plaintiff is diseased; (2) where the defendant is diseased. And the second class may again be divided into: *a,* cases where the disease is not known to the defendant at the time of the engagement or arises thereafter; and *b,* cases where the disease of the defendant is known or ought to be known by him at the time of the engagement and is unknown to the plaintiff.

The first class is exemplified by *Goddard* v. *Westcott,* 82 Mich. 180. There the defendant sought to show by evidence that the plaintiff had a tumor, knowledge of which she concealed from him, but the evidence was excluded. CAHILL, J., in holding the *nisi prius* judge's ruling erroneous, said, "It must appear that she was at the time capable of making such a contract, and carrying it out, without fraud or injury to the defendant * * * if it appeared from her own statement that she knew she was diseased, or in any way physically disqualified from entering the marriage state, and that she concealed the fact from the defendant, it would have been a fraud upon the defendant and would prevent her recovering anything, except possibly, nominal damages upon the case as made by herself and without reference to any defense." In *Travis* v. *Schnebly,* 68 Wash. 1, the plaintiff, subsequent to the engagement, became afflicted with an ailment known as a floating kidney, which rendered her unfit for marriage. The court said that a refusal to marry was justifiable since "the agreement * * contemplated that the appellant was to marry a healthy woman. He at no time agreed to marry an invalid * *. Ill health of one party, contracted without his or her fault, after the original promise to marry, is a defense available to the other party in an action for breach of promise. A man who has only agreed to marry a healthy woman should not be compelled to accept her as his wife should she become an invalid before marriage". The same doctrine was adhered to in a second appeal of this case reported under the same name in 156 Pac. 400. Mr. Justice PAXSON in *Gring* v. *Lerch,* 112 Pa. St. 244, held that the plaintiff's failure to have a physical impediment to marriage removed was a good defense to an action for the breach of the contract. *Walker* v. *Johnson,* 6 Ind. App. 600, was a case in which a plaintiff was a victim of epileptic fits. The court said, "Any condition of mind or body which renders a man less fitted to fill the position of husband, or a woman less fitted to fill the position of wife,

may be given in mitigation. *Goddard* v. *Westcott, supra, Miller* v. *Rosier,* 31 Mich. 475, BISHOP, MARRIAGE & DIVORCE, § 230." But in *Baker* v. *Cartwright,* 10 C. B. N. S. 123, it was held that the plaintiff's having been insane previous to the making of the marriage promise was no defense. The Appellate Court of Illinois in *Kantzler* v. *Grant,* 2 Ill. App. 236, held that syphilis of the plaintiff was a good defense to an action of breach of promise. The defendant had no reason to believe that she was afflicted with venereal disease at the time of the engagement. An unusual state of facts is found in *Edmonds* v. *Hughes,* 115 Ky. 561. There the plaintiff, subsequent to the engagement, had her ovaries removed, there being no necessity for the operation; this was held to be a good defense. Lord KENYON in *Atchison* v. *Baker,* 2 Peake's N. P. Cas. 103 (1796) held that an abscess on the plaintiff's breast was a good defense. The most recent English case on this subject is *Jefferson* v. *Paskell* [1916] 1 K. B. 57. It was left to the jury to say whether or not the plaintiff was suffering from tuberculosis at the date set for the marriage. This case indirectly approves the dictum of CROMPTON, J., in *Hall* v. *Wright,* El. Bl. & El. 746, to the effect that bleeding lungs of the man would excuse the woman from consummating the contract. And in a Washington case (*Grover* v. *Zook,* 44 Wash. 489, 87 Pac. 638, 7 L. R. A. (N. S.) 582, 120 Am. St. R. 1012, 12 Ann. Cas. 192) where the tuberculosis of the plantiff was known to the defendant at the time of making the marriage promise, it was held that no action would lie for the breach. This decision is based expressly on the ground that the consummation of the contract under such conditions is against public policy; that it is a promise better broken than kept. This holding makes it possible for a man to play with the affections of a sick woman, induce her to believe he intends to marry her, and then break the promise with impunity. While such is the effect from one viewpoint, public policy, looking toward the physical betterment of the race, undoubtedly outweighs mere wounded affections and possibly slight personal damage.

Subdivision *a* of the second class of cases is represented by the principal case. It is supported by *Sanders* v. *Coleman,* 97 Va. 690, 34 S. E. 621, 47 L. R. A. 581. The defendant in that case subsequent to the engagement contracted without fault on his part a urinary disease rendering marriage somewhat hazardous. The court said, "Our conclusion upon the law and the evidence is that the defendant acted throughout with good faith, and the unhappy circumstances in which he found himself justified the alleged breach of his contract to marry the plaintiff." *Shackleford* v. *Hamilton,* 93 Ky. 80, 19 S. W. 5, 15 L. R. A. 531, 40 Am. St. R. 166, was a case in which the defendant, after having been apparently cured, had syphilis reappear subsequent to the marriage promise. The underlying principle of this case is well stated in the head-note of the original report, thus, "It is implied as a part of every agreement to marry that any subsequent change in the mental or physical condition of either party without fault, so as to render it impossible in the nature of things to accomplish the objects of the marriage relation, will release the parties from the agreement." This

case was followed in *Gardner* v. *Arnett,* 21 KY. L. REP. 1, 50 S. W. 840. *Trammel* v. *Vaughn,* 158 Mo. 214, 59 S. W. 79, 51 L. R. A. 854, 81 Am. St. Rep. 302, was similar on its facts to the *Shackleford* case, supra, MARSHALL, J., in rendering his opinion expressed his view to be that "if the disease is of a temporary character, such as was the case here, and can easily be cured, the defendant is entitled to postpone the marriage until he is cured, and if the disease is of a more permanent nature * * * the defendant is not only entitled to refuse to carry out the contract but it is his duty to do so".

In 1879 the New Jersey Supreme Court held that impotency of the defendant, known to the plaintiff at the time of the engagement, was a good defense to an action for breach of promise. *Gulick* v. *Gulick,* 41 N. J. L. 13. The weight of this decision with respect to the matter under discussion is somewhat impaired because it rests partly on a statute (Rev. p. 315, No. 4) to the effect that a marriage contracted, one of the parties being impotent, may be declared void *ab initio.* The two leading cases advancing the doctrine that the subsequent disease of the defendant will not excuse a breach are *Hall* v. *Wright,* El. Bl. & El. 746, and *Smith* v. *Compton,* 71 N. J. L. 548. The English case—the Queen's Bench being equally divided—was appealed to the Exchequer Chamber, where it was held (BRAMWELL, B., POLLOCK, B., and WATSON, B., dissenting) that lung bleeding of the defendant, arising subsequent to the marriage promise, was not a good plea to an action for breach of promise of marriage. CROWDER, J., said, "But I am of the opinion that it is no excuse for the breach of a promise to marry, that the performance of conjugal duties would be attended with danger to the defendant's life." CROMPTON, J., in rendering his opinion in the Queen's Bench remarked, "but I can not think that the mere fact of not being able to perform the functions of marriage without danger to life, of itself, puts an end to the contract." One reflecting upon the high regard of the common law for life and liberty feels no little surprise when he learns that a man, who through unfortunate circumstances and no fault of his own, is rendered unfit for marriage, must hasten to the grave *via* the marriage altar, or else be mulcted in damages. This case was followed in *Smith* v. *Compton,* 71 N. J. L. 548. There the defendant after the engagement, developed a urinary disease through no misconduct of his own. The court said, "It is undeniably the general rule that if a party enter into an absolute contract without any qualification or exception he must abide by the contract and either do the act or pay the damages. *Rosenbaum* v. *United States Credit System Company,* 35 Vroom (N. J.) 34."

Subdivision *b* of class number II is represented by *Allen* v. *Baker,* 86 N. C. 91. There the defendant's intestate had through his own imprudence contracted a venereal disease. It was held that the defendant would be answerable in damages if the intestate contracted the disease subsequent to the betrothment, or if before, and he was aware or had reasonable ground to believe that he could not be cured. However, if he had the disease prior to the promise, yet he would not be liable if he had reason to believe that it was only temporary.

Broadly speaking the tendency of the decisions is to announce the doctrine that an infirmity in the health of either party rendering marriage dangerous to either is a good defense to an action for a breach of the contract. This rule is the result of a public policy which declares that it is better to disappoint the expectations of a young woman than to increase the population of our county poor-houses and insane asylums. The contrary doctrine is the product of a strict adherence to the "Act of God" rule which says that a breach of contract is not excusable unless the performance thereof is rendered impossible by some unforeseen circumstance which was not in the contemplation of the parties at the time of the making of the contract. This rule requires actual physical impossibility of performance. POLLOCK in his work on CONTRACTS, p. 546 (3rd Am. Ed.), in speaking of the application of the "Act of God" rule says, "The question is not whether there is an absolute impossibility" of performance "but what is the true meaning of the contract." The application of POLLOCK's doctrine sustains the majority of the cases cited. A. A. M.

THE EFFECT OF A JUDGMENT AGAINST ONE JOINT TORT-FEASOR.—In the recent case of *Ketelson* v. *Stilz et al.*, 111 N. E. 423, the plaintiff sued one McCleay, a joint tort-feasor with defendant, recovered a judgment, and caused an execution to be issued against McCleay on this judgment which execution was returned *nulla bona*. The plaintiff later sued defendant, the other joint tort-feasor, who sets up that the former judgment and execution constitute a bar to this suit. The Supreme Court of Indiana held that the judgment and execution issued against McCleay were not a bar to an action against the defendant, the other tort-feasor.

There seem to be three rules in regard to the effect of a judgment against a tort-feasor on the liability of a co-tort-feasor: (1) the rule as laid down in England is that a judgment in an action against one of several joint tort-feasors is a bar to an action against the others for the same cause, although such judgment remains unsatisfied. *Brown* v. *Wootton* (1606) Cro. Jac. 73; *Brismead* v. *Harrison* (1872) L. R. 7 C. P. 547, 41 L. J. C. P. N. S. 190. The reason for these cases is that if it were not held to be a defense, the effect would be to encourage any number of vexatious actions whenever there happened to be several joint wrong-doers. Too, judgment having been recovered against one or more of the wrong-doers, and damages assessed, if that judgment afforded no defense, the plaintiff might proceed to trial against another of them, and the second jury might assess a different amount of damages, etc. (2) Numerous authorities in the United States adhere to the doctrine that the plaintiff may have separate actions and recover judgments against each of the joint tort-feasors, but then, after having the privilege of electing *de melioribus damnis*, his taking out execution extinguishes his right to proceed against the others, although he failed to obtain satisfaction. *Boardman* v. *Acer*, 13 Mich. 77, 87 Am. Dec. 736; *Kenyon* v. *Woodruff*, 33 Mich. 310; *Criner* v. *Brewer*, 13 Ark 225; *Davis* v. *Scott*, 1 Blackf. (Ind.) 169; *Fleming* v. *McDonald*, 50 Ind. 278,